North Dakota Law Review

Volume 34 | Number 2 Article 4

1958

Constitutionality of Questioning Bar Applicants as to Political Beliefs

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NOTES

CONSTITUTIONALITY OF QUESTIONING BAR APPLICANTS AS TO POLITICAL BELIEFS

One of the most vexatious problems confronting modern jurists has been brought into sharp focus in the past decade *i. e.*, the right of the government to search the minds of men to ascertain their political beliefs. This controversial issue has been manifest in the areas of congressional investigation, labor union management, public employment and employment in "sensitive" areas both in and out of government. Ironically enough the problem of inquiry into political affiliations has also come to haunt the courts, and the legal profession in general, in their own "backyard", namely in proceedings for admission to the bar.

The great mass of litigation in this field has resulted in the crystallization of two dilemmas.[1] The first, must the right of inquiry into political beliefs render the government too strong for the liberties of its people, or, the absence of that right render the government too weak to maintain its own existence? The second is one which runs true in every field of the law; the desire for certainty in legal principles on the one hand, and the desire for justice in the individual case on the other.

What about the states' inquiries into political beliefs and affiliations? Are they a violation of the first amendment freedoms of speech, thought, conscience, etc., as they are embodied in the fourteenth amendment of the United States Constituion? Are such inquiries *ever* relevant to the determination of fitness to practice law? And if so, what are the limitations on this right of inquiry into the political beliefs of an applicant? Assuming that said inquiries are constitutional and relevant, would there, in fact, be any protection against arbitrary and discriminatory use of that right in view of each state's near absolute power to determine membership in its bar? It is hoped that this article will contribute to the better understanding of and the ability to cope with the complex principles inherent in these questions.

In all states the moral character and general fitness of applicants for the bar must be approved prior to their admission to practice.[2] The majority of states provide for a character investigation of applicants either by the bar examining board or by a separate char-

1. Comment, *Current Limitations on Governmental Invasion of First Amendment Freedoms*, 13 Ohio St. L. J. 237, (1952).
2. Rules for Admission to the Bar (West Publishing Co., 1957).

acter committee.[3] The board or committee, in its investigation, may inquire into any matter that is relevant to the determination of the applicant's character and general fitness for the practice of law.[4] The applicant is required to disclose any relevant matter, such as a prior conviction or indictment,[5] previous disbarment for professional misconduct,[6] or personal misconduct which affects his fitness to practice.[7]

The recommendation made by the character committee or examining board on the basis of its inquiry is subject to judicial review, but it is usually considered to be conclusive in the absence of a clear abuse of discretion.[8] It should be noted that prior to the case of *In re Summers*[9] there was no recognition of a federally protested guarantee of due process in state bar admission proceedings. But in the *Summers* case the Court held that, a claim of a present right to admission to the bar of a state and a denial of that right is a controversy which may be reviewed when federal questions are raised.[10]

In a number of states an inquiry into the applicant's loyalty is included as part of the character investigation.[11] Courts have held that an individual may be denied admission to the bar[12] or dis-

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3. For a full listing of the various character requirements and investigative procedures, See Jackson, *Character Requirements for Admission to the Bar*, 20 Fordham L. Rev. 305, (1951).

4. *In re Stepsay*, 15 Cal. 2d 71, 98 P.2d 489 (1940). (The inquiry into the moral character of the applicants for admission is broader in scope than in a disbarment proceeding.).

5. Spears v. State Bar of California, 211 Cal. 183, 294 Pac. 697 (1930) (forgery); People v. Mead, 29 Colo. 344, 68 Pac. 241 (1902) (embezzlement); Grievance Comm. of Hartford Bar v. Broder, 112 Conn. 263, 152 Atl. 292 (1930) (adultery); People *ex rel.* Healy v. McCauley, 230 Ill. 208, 82 N.E. 612 (1907) (extortion); *In re* West, 212 N.C. 189, 193 S.E. 134 (1937) (fraud); *In re* Ulmer, 208 Fed. 461 (N. D. Ohio 1913) (perjury).

6. *In re* Mash, 28 Cal. App. 692, 153 Pac. 961 (1915); State Bar v. Riccardi, 53 Nev. 128, 294 Pac. 537 (1931).

7. *In re* Wells, 36 Cal. App. 785, 172 Pac. 93 (1918); *In re* Moshkow, 250 App. Div. 780, 294 N. Y. Supp. 474 (2d Dep't 1937).

8. To show abuse of discretion the applicant would probably have to prove prejudice on the part of the examiners, lack of fair procedure during inquiry, or a decision manifestly contrary to the evidence. See, *e. g.*, Higgins v. Hartford County Bar, 111 Conn. 47, 149 Atl. 415 (1930); *In re* Frank, 293 Ill. 263, 127 N.E. 640 (1920); *In re* Hughey 62 Nev. 498, 156 P.2d 733 (1945); Application of Stone, 74 Wyo. 389, 288 P.2d 767 (1955); *In re* Latimer, 11 Ill.2d 327, 143 N.E.2d 20 (1957).

9. 325 U. S. 561 (1945); *cf.* Bradwell v. Ill., 16 Wall. 130 (1872) (Exclusion of female applicant not a denial of privilege and immunities under the fourteenth amendment).

10. 325 U. S. 561, 568 (1945) The case exemplifies the attitude of the United States Supreme Court of allowing the states full rein over the interpretation of requisite moral standards as well as over admissions generally.

11. For a comprehensive survey of the actual inquiries made by bar committees during their character investigation of applicants, See Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. Chi. L. Rev. 480 (1953).

12. Application of Cassidy, 268 App. Div. 282, 51 N. Y. S.2d 202 (2d dep't 1944), *aff'd*, 296 N. Y. 926, 73 N.E.2d 41 (1947) (Member of Christian Front denied admission for advocating the unlawful use of force against subversive elements).

barred from practice [13] because of his *participation* in an organization which advocates the use of unlawful force to effectuate social change.

Until recently it had not been determined whether *mere membership* in the Communist Party would disqualify the individual for the practice of law, as the courts have based their earlier decisions on the overt activity of the person involved.[14] However, in the case of *Schware v. Board of Bar Examiners*[15] the Supreme Court held that the petitioner's *past* membership in the Communist Party did not justify an inference that he presently has bad moral character. In view of the Communist Control Act of 1954 which stripped the Communist Party of any of the rights of recognized political parties it is doubtful that *present* membership could be considered innocent.[16]

The questions of (a) past or present membership in the Communist Party as grounds for denying an individual his chosen profession and (b) whether or not an individual can be required to disclose his political affiliations or beliefs in answer to an inquiry by the bar authorities have reached the courts twice in the last three years.[17]

The Supreme Court of the United States, in *In re Anastaplo*,[18] left in effect an Illinois ruling that the Committee on Character and Fitness may legitimately question applicants for admission to the Illinois Bar about membership in the Communist Party or in any other subversive organization on the list compiled by the United States Department of Justice. The Illinois Court had held that such questions were relevant to the determination of good

13. Margolis's Case, 269 Pa. 206, 112 Atl. 478 (1921) (disbarment for advocating anarchism and obstructing the draft); *In re* Smith, 133 Wash. 145, 233 Pac. 288 (1925) (disbarment for sympathetically addressing the I.W.W.); *But cf., In re* Clifton, 33 Idaho 614, 196 Pac. 670 (1921) (disloyal statements made by attorney not ground for disbarment).

14. See Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. Chi. L. Rev. 480, 495 (1953).

15. 353 U. S. 232, 245 (1957) The Court went on to say, "Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct."; Wieman v. Updegrafl, 344 U. S. 183, 191 (1952) The Court further reiterated, "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." See also Schneiderman v. U.S., 320 U.S. 118, 136 (1943) where the Court said, ". . . under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all its platforms or asserted principles."

16. See Communist Control Act, 68 Stat. 775 (1954), 50 U. S. C. § 841 (Supp. IV, 1957). See also, Note, *Membership in or Affiliation with the Communist Party as Grounds for Disbarment*, 26 Notre Dame Law. 498 (1951) which covers the subject of exclusion as well as disbarment.

17. *In re* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954), *cert. denied*, 348 U. S. 946 (1955); Konigsberg v. State Bar of California, 353 U. S. 252 (1957).

18. *In re* Anastaplo, *supra* note 17.

citizenship of an applicant and his ability to take the oath[19] of a lawyer in good conscience, and that a refusal to answer them was a basis for the denial of a certificate to practice law.[20]

In this case, the record of the applicant was above reproach.[21] In the questionnaire submitted along with his application he stated without mental reservation that he supported and in the future would continue to support the Constitution of the United States and the state of Illinois. However the panel, and later the full committee, questioned the applicant about his views regarding the desirability of allowing Communists to practice law and inquired into his beliefs in the right of revolution. When the applicant replied that be believed that members of the Communist Party, if otherwise qualified, should be admitted to the bar and that the right to revolt by force of arms, if necessary, is an inherent and traditional American political theory as embodied in the Declaration of Independence, the panel and the committee proceeded to question him about his political affiliations and about the newspapers to which he subscribed. The refusal of the applicant to answer these questions, a refusal based on the first and fourteenth amendments (not on the plea of self-incrimination), prompted the Committee to deny his application.[22]

It would appear that it was because of his answers concerning the right to revolution and the right of a Communist to practice law, that the applicant was asked about his political affiliations. This point might well be important in considering whether the inquiry into his political affiliations was constitutional and relevant.

To be contrasted with *In re Anastaplo* is the case of *Konigs-*

19. Ill. Rev. Stat. c.13, § 4 (1895) (Applicant is required to take a statutory oath to support the Constitutions of the United States and Illinois.).

20. *In re* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).

21. See London, *Heresy and the Illinois Bar; the Application of George Anastaplo for Admission*, 12 Law. Guild Rev. 163 (1952) (Mr. Anastaplo served in World War II as an officer in the United States Air Force, in the Pacific, European and Middle Eastern Theatres. His character references were from a former mayor of his home town, a United States Congressman, a newspaper editor, and several law professors and former teachers. One of these teachers said: "He was one of the two most brilliant minds I have ever taught. His moral standards are impregnable." Another referred to him as being . . . "alert at once to the special resonpsibilities and potentialities of the law and of its function in American society. His devotion to the deepest American moral and political principles is beyond question.").

22. *In re Anastaplo*, 3 Ill.2d 471, 121 N.E.2d 826 (1954); *Compare, In re* Summers, 325 U. S. 561 (1944) where the Court had been faced with a related problem involving admission to the Illinois Bar. (In that case the action of the Illinois Court, in refusing to admit the applicant (conscientious objector), was upheld in a 5 to 4 decision. The denial of admission was based upon the applicant's insistence on a qualification of the oath to the effect that he would not employ force to support the Constitution.) The instant case poses substantially the same issue, since the applicant's expressed belief in the "right to revolution" is similarly a conscientious objection that is inconsistent with the taking of an unqualified oath. Thus both cases uphold exclusion from membership in the bar based upon the ground that the oath, if taken, would not be in good faith.

berg v. The State of California.[23] In that instance the Supreme Court granted certiorari and reversed the decision of the California Court which had affirmed the action of the State Bar Examiners in refusing to certify the petitioner to practice law. They had denied him admission on the grounds that he had (1) failed to prove that he was of good moral character and (2) failed to prove that he did not advocate the overthrow of the governments of the United States and California by unconstitutional means.[24]

The Court examined (1) the testimony of an ex-Communist who had testified that Konigsberg had attended party-unit meetings in 1941; (2) his public criticism, in an editorial, of American foreign and domestic policy and of certain public officials; *and* (3) his refusal to answer questions as to political affiliations.[25] They held, in a four to three decision, that there was no evidence in the record which rationally justified a finding that the petitioner had failed to satisfy the above two requirements of good moral character and non-advocacy to overthrow the governments even though he refused to answer questions as to his political associations.[26]

It should be noted that there was no indication, in the eyes of the majority of the Court, that the denial of admission to the bar by the State Bar Examiners had been based solely on a refusal to answer;[27] they found it unnecessary to decide whether such an independent ground for exclusion would be constitutional.[28] In effect the Court has said that California's refusal to admit the petitioner is a denial of due process and of equal protection of the laws because it is both arbitrary and discriminatory.[29]

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23. 353 U.S. 252 (1957).

24. California Business and Professions Code, 1937, § 6060 (c) requires that an applicant must have "good moral character" before he can be certified. § 6064.1 provides that no person "who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."

25. Konigsberg v. State Bar of California, 353 U. S. 252, 266 (1957).

26. *Ibid.*

27. *Id.* at 259 and n.12.

28. Konigsberg v. State Bar of California, 353 U. S. 252, 261 (dictum) "Serious questions of elemental fairness would be raised if the committee had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone . . ." "If it were possible for us to say that the board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations . . . then we would be compelled to decide far reaching and complex questions relating to freedom of speech, press and assembly." "If and when a state makes a failure to answer a question an independent ground for exclusion from the bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible."

29. *Id* at 262. See Schware v. Board of Bar Examiners, 353 U. S. 232, 248-249 (1957) (concurring opinion) (Mr. Justice Frankfurter emphasized that it was not the Supreme Court's business to substitute its judgment for that of a state, nor was the Court an "overseer of a particular result" of any state's procedure for admission to the bar. "But judicial action, even in an individual case, may have been based on avowed

In a dissenting opinion,[30] Mr. Justice Harlan, joined by Mr. Justice Clark, vigorously attacked the majority's approach to the "refusal-to-answer" issue. The dissenters were of the opinion that the majority by not holding that the matter inquired into was privileged, yet upholding the refusal to answer, imposed their own notions of public policy in a matter of state concern. They felt that it was beyond question that a state may refuse admission to an applicant who refuses to answer questions relevant to his qualifications if such questions do not invade a constitutionally privileged area.

In summing up the *Konigsberg* decision, limiting the review to the "refusal-to-answer" aspect of the case, the holding indicates that the inquiries into the applicant's political affiliations were *not* relevant to a determination of his fitness to practice law. Therefore his refusal to answer was deemed no basis for denying admission. The Court refused to consider whether such inquiry could ever be relevant to a determination of an applicant's fitness so as to render a refusal to answer a basis for denial of admission. In effect, the Court carefully avoided ruling that the petitioner's refusal to answer was or was not privileged under the first and fourteenth amendments.

In comparing the two principal cases of *In re Anastaplo* and *Konigsberg v. The State Bar of California,* it would appear that two very similar situations resulted in directly opposite decisions. *In re Anastaplo* produced a denial of admission to the bar for a refusal to answer questions concerning political affiliations. Yet, in *Konigsberg v. The State Bar of California,* the Supreme Court reversed a denial of admission and held that there was no evidence to justify exclusion *even though* the petitioner refused to answer

considerations that are inadmissible in that they violate the requirements of due process. Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on consideration that offends the dictates of reason offends the Due Process Clause.").

30. See Konigsberg v. State Bar of California, 353 U.S. 252, 276 (1957) (dissenting opinion) (The dissenters argued that what the state has done was to say that the petitioner's refusal to cooperate in answering relevant questions had "made it impossible to proceed to an affirmative certification that he was qualified—*i. e.*, that his refusal placed him in a position where he must be deemed to have failed to sustain his burden of proof. Whether the state was justified in doing this under the Fourteenth Amendment is the sole issue before us . . ."

Mr. Justice Harlan, speaking for the dissenters, went on to say, ". . . it seems to me altogether beyond question that a state may refuse admission to its bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area." He said, "For me, it would at least be more understandable if the Court were to hold that the Committee's questions called for matter privileged under the First and Fourteenth Amendments. But the Court carefully avoids doing so." "What the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment." In the dissenters' view the decision represented an unacceptable intrusion into a matter of state concern.).

questions as to political affiliations. What is the *all important* distinction?

The implication seems to be that, in the former case, an inquiry into Mr. Anastaplo's political affiliations was deemed *relevant* and proper because his statements professing the "right to revolt" and the "right of a Communist to practice Law" raised a substantial doubt as to his *present* loyalty and his ability to take the lawyers' oath in good faith. In the latter case such an inquiry was deemed irrelevant and improper because there was no evidence which could be said to have raised a substantial doubt as to Mr. Konigsberg's *present* loyalty—the existing evidence[31] having pointed to a *past* Communist Party affiliation,[32] if any.

In neither case was there a specific ruling by the Supreme Court of the United States on the constitutional issue, *i.e.* Can a state inquire into the political affiliations of bar applicants? No test was set out for determining when such injury will be held constitutional and when unconstitutional with respect to the freedoms guaranteed by the first and fourteenth amendments. An analysis of the cases and vast amount of material on this subject reveals, however, the legal processes utilized by the Supreme Court in deciding each individual case.

It was said in the case of *American Communications Ass'n v. Douds*[33] that government's "interest in the character of members of the bar, Re Summers,[34] 325 U.S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment". The question is, when are these limitations justified? A hint is given in the *Douds* case as to the test applied when, in further analyzing the *Summers* decision, the Court observed that the relation between the obligations of membership in the bar and service required by the state in time of war, the limited effect of the state's holding upon speech and assembly, and the strong interest which every state court has in the persons who become officers of the court are sufficient to justify the state action.[35]

The latter statement exemplifies the Court's current trend to swing away from the strict test of "clear and present danger" to the "balancing of the interests" test in first amendment cases in-

31. See Konigsberg v. State Bar of California, 353 U. S. 252, 266 (1957) (testimony of one ex-Communist; editorials; refusal to answer).
32. Schware v. Board of Bar Examiners, 353 U. S. 232 (1957) (Past membership in Communist Party does not justify an inference of present bad moral character).
33. 339 U. S. 382, 398 (1950).
34. See note 22 *supra*.
35. American Communications Ass'n. v. Douds, 339 U. S. 382, 405 (1950).

volving pure civil liberties situations.[36] The "balancing of the interests" test holds that, after a finding of a factual invasion of first amendment freedoms, the individual interest side is weighed by considering the nature of the aspect invaded, the magnitude of the invasion, and the appropriateness of the invasion. Then the Court decides whether or not there is a factual public interest by determining if the governmental action has a constitutionally permitted objective. If it has, the public interest side is weighed by a consideration of the substantive importance of the objective, the nexus between that objective and the governmental action, and the basis used to establish the nexus. If the individual interest side weighs the heaviest, the governmental action is unconsititutional; if the public interest side weighs heaviest, governmental action is constitutional.[37]

In a hypothetical application of this "balancing of the interests" theory let us assume that there is very substantial evidence that an individual applying for admission to the bar is presently a member of the Communist Party. After an inquiry by the state and a refusal to answer by the applicant, he is denied admission solely on the ground that he refused to answer what was deemed to be a relevant inquiry into his fitness to practice law.

On the individual interest side of the scale there is a factual invasion of first amendent freedoms *i. e.*, an exclusion from the bar for refusing to answer has the effect of discouraging the expression of political rights protected thereunder. Next the Court would consider the magnitude of the invasion in order to weigh the individual interest invaded. It could be said that the effect of the state's action on the individual's exercise of this freedom would be slight since he could continue to hold his beliefs and principles so long as he did not practice law. Finally, the appropriateness of the invasion and permissibility of the government's objective might be affirmed on the basis of the Communist Control Act of 1954 (establishing a factual public interest).

Weighing the public interest side, the inquiry is designed to discover and exclude persons who advocate world revolution and the use of the practice of law as a weapon to abuse the courts, ridicule justice,[38] destroy the very constitutional liberties sought to be

36. See Comment, *Current Limitations on Governmental Invasion of First Amendment Freedoms*, 13 Ohio St. L. J. 237 (1952) for a complete analysis.

37. *Id* at 264.

38. A recent example of interference with judicial proceedings was the ordeal of Judge Medina in the trial of the eleven Communists, United States v. Sacher, 182 F.2d 416 (2d Cir. 1950), for violation of the Smith Act, 18 U. S. C. § 2385 (Supp. 1950). The defense attorneys made little effort to exonerate their clients—the sole purpose of the trial was to

preserved and to eventually extinguish democracy itself. A reasonable nexus exists between the objective and the action taken (inquiry into political beliefs) and the nexus is established on a class basis. The Court might rationally find that the Communist is not like other lawyers in his utilization of the courts in our system.

In the "balancing" process one could decide that, because the invasion by the state's action was slight in terms of magnitude, the important objective of the state would override the invasion even though there was only a reasonable nexus established on a class basis. Comparing this hypothetical situation with an actual case, the Court said in the *Douds* case that "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity."[39]

The shift to the "balancing of the interests" test reminds us that the Constitution is a substantially different document from the one which was accepted by the original thirteen states. As the needs of the nation have shifted, and will perpetually continue to shift, certain of the basic principles which then existed have been encroached upon and face further alteration to meet those needs. If this were not true, the country could, one day, find itself barren of all fundamental rights. This being so, the few who wish to keep their precious silence must suffer an inconvenience of benefit to the majority so that the majority, as well as the few, may continue to enjoy the degree of freedom they now possess.

The cases substantiate this discussion. Thus, while it is conceded that an inquiry into an applicant's political affiliations ordinarily would be irrelevant,[40] an inquiry regarding an applicant's present membership in the Communist Party, whose conspiratorial purpose is well recognized,[41] would appear to be particularly rele-

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make a mockery of American justice. These lawyers heaped abuse upon the United States, the Constitution, and its officers, and made repeated efforts to fill the record with error so that the case would go through repeated appeals and be kept in the eyes of the public. The Communists who were being tried were to be martyrs for the party.

39. American Communications Ass'n. v. Douds, 339 U. S. 382, 397 (1950).

40. See West Virginia Board of Education v. Barnette, 319 U. S. 624, 642 (1943) where Mr. Justice Jackson stated, "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

41. See Mr. Justice Jackson's opinion in American Communications Ass'n. v. Douds, 339 U. S. 382, 424 (1950), where the Communist Party is characterized as a "revolutionary junta" whose purposes are foreign to our constitutional system of government. See also, Communist Control Act, 68 Stat. 775 (1954), 50 U. S. C. § 841 (Supp. IV, 1957).

vant to the determination of his fitness to practice law.[42] In this connection an applicant expounded at great length, in *Martin v. Law Society of British Columbia*,[43] upon freedom of expression, freedom of thought, freedom of the individual, and the protection of minorities arguing that he should not be denied the "right" to practice law. And the court said: "How these 'freedoms' can be invoked on behalf of an avowed Communist to place him in a position where he could more effectively destroy them, is a paradox. But this type of paradox is consistent with the Communist plan of infiltration which disclosures in the United States in particular have made a matter of common knowledge in our day."[44]

However, a conclusion that a present day Communist should be denied admission to the bar does not justify inquiry into the political beliefs and affiliations of all applicants. It would seem more consistent with our theory of government to assume that candidates for membership in the bar are presently loyal, and therefore not to be subjected to such inquiry unless substantial competent evidence to the contrary is obtained.[45] But once such evidence does raise a bona fide doubt as to present loyalty, inquiry becomes relevant and should not be defeated by the applicant invoking his rights of free speech, free thought and freedom to follow the dictates of his conscience, under the first and fourteenth amendments. Furthermore, disclosures of past membership in the Communist Party,[46] past membership in an organization on the Attorney General's list[47] or of other facts in connection with loyalty would not necessarily result in denial of admission to the bar. The recent cases[48] certainly illustrate the protection afforded an applicant against arbitrary and discriminatory exclusion.

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42. The American Bar Association has recommended that each state require each member of the bar to file an affidavit stating whether he is, or ever has been, a member of an organization supporting the overthrow of the government by unconstitutional means. *Proceedings of the House of Delegates*, 36 A.B.A.J. 948, 972 (1950).

43. 3 D.L.R. 173 (B. C. Ct. of App. 1950).

44. *Id* at 179.

45. *Cf.* Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U.Pa.L.Rev. 480, 482 n.5 (1953).

46. See Schware v. Board of Bar Examiners, 353 U. S. 232 (1957). A person may have joined to obtain social reforms—depression era; or to help defeat Facism—war years.

47. *Cf.* Wieman v. Updegraff, 344 U. S. 183 (1952) (The Supreme Court decided that the "Oath of Allegiance" demanded of all public employees in Oklahoma was unconstitutional because it was impossible for the employee to show that his membership in a subversive organization had been an innocent one. The Court then stated that to bar a candidate for office or a civil servant or teacher because of an affiliation maintained in *reasonable* ignorance of the purpose and aims of the organization would be a denial of due process, and that this requirement of *knowledge* had been established in three other loyalty cases: Adler v. Board of Education, 342 U. S. 485 (1952); Garner v. Board of Public Works, 341 U. S. 716 (1951); Gerende v. Board of Supervisors, 341 U. S. 56 (1951).

48. See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

The practice of law depends on high moral character and legal training. The state bar is allowed great autonomy in determining moral fitness, and its determination will be sustained despite an incidental impingement of freedom of religion, speech, belief, or political affiliation. Because of the high standing of lawyers in the community, the vital nature of the administration of justice, and the ability of a few to bring justice into disrepute, the argument is strong that a state can inquire into political affiliations to protect itself from subversion of such an important function. In the case of Communists it has been convincingly demonstrated that they will take advantage of positions of trust and confidence to advance their cause *i. e.*, the destruction of free institutions; therefore the courts, through their inherent powers, should be entitled to protect themselves from internal enemies by denying Communists admission to or continuance in the practice of law.

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THE SMALL LOAN PROBLEM IN NORTH DAKOTA

In a recent decision[1] the North Dakota Supreme Court upheld the granting of an injunction and appointment of a receivership against the Peerless Finance Company of Fargo. In the complaint filed by the state it was alleged that the loan company was guilty of gross violations of the usury laws[2] in lending small amounts of money at interest rates ranging from 149 to 277 percent per annum.

This case graphically illustrates the existence of the "loan shark" problem in North Dakota.[3] Usury and the plight of the small debtor is a problem as old as the recorded history of man.[4] However, the advent of the industrial revolution and the formation of modern capitalism fathered the loan shark as he exists today. It is easy to see that when men lived upon the soil their outside needs were relatively few, but with the coming of the machine age this independence was lost and the family became dependent on a pay slip and a money economy.

In America the populous states and the industrial centers were

1. State *ex rel.* Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957).
2. N. D. Rev. Code §§ 47-1409, 47-1410, 47-1411 (1943).
3. The vicious term "loan shark" has been somewhat mildly defined by one author as follows: "A loan shark is one who lends comparatively small sums of money as a business, at high and almost always illegal rates of charge under conditions which defraud and oppress the borrower." Hubachek, *The Development of Regulatory Small Loan Laws*, 8 Law & Contemp. Prob. 108 (1941).
4. Deuteronomy XXIII, 19, 20; Hamilton, *In Re The Small Debtor*, 42 Yale L.J. 473 (1933).